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No. 86-1725

In the Supreme Court of the United States

OCTOBER TERM, 1987

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO AND LEYBDA CORPORATION, S.A., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The government instituted this action for civil forfeiture under 8 U.S.C. (& Supp. IV) 1324(b), alleging that crewmembers of the Lear Jet at issue in this case had made material misrepresentations on their visa applications, within the meaning of 8 U.S.C. (Supp. IV) 1182(a)(19). Petitioner Leybda Corporation is a Panamanian subsidiary of a Nicaraguan corporation and, as the owner of the jet, challenged the forfeiture. The district court held that the pilot and crewmembers of the jet had violated the statutory scheme through the misrepresentations they made on their visa applications. Accordingly, the district court ordered the jet forfeited. The court of appeals affirmed the forfeiture judgment. 808 F.2d 765 (1987). In doing so, the court of appeals rejected the argument by petitioner Leybda Corporation that the lower

court erred by applying the wrong standard of materiality in determining whether the misrepresentations satisfied the statute. The court of appeals also found that it had jurisdiction to consider to matter even though the res in question, the Lear Jet aircraft, had been removed by the government to Mississippi and was therefore beyond the court's jurisdiction. Removal of the plane occurred only after Leybda failed to file a motion for a stay of judgment with the district court or a supersedeas bond with the court of appeals. In addition, no stay was in effect under the automatic stay provision, Fed. R. Civ. P. 62(a), which expired after ten days.

2. Subsequently, the panel opinion was vacated and the case ordered to be reheard before the court en banc. 831 F.2d 221 (1987). Upon reconsideration, which was limited to the jurisdictional issue, the court issued a published opinion on February 11, 1988. 836 F.2d 1571 (1988) (en banc). In that opinion the court observed that the government had initiated this action under 28 U.S.C. 1345 and 1355. The court found that there was no in personam jurisdiction over the parties because the action was solely in rem. As such, the court concluded that the government was free to remove the aircraft once the judgment became final and that there was no stay in effect preventing the government from taking that action. Because the res had been removed from the jurisdiction of the court, the en banc court held that it lacked jurisdiction to entertain Leybda's claim on the merits.

3. Petitioners filed their petition with this Court prior to the entry of the order of the en banc court vacating the panel opinion. Accordingly, the petition addresses only the panel's ruling with regard to the materiality of the statements leading to forfeiture of the aircraft. Because the court of appeals' judgment no longer rests on the court's materiality ruling, further review of that issue is no longer appropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
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